THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v 610539 SASKATCHEWAN LIMITED (operating as Heritage Inn in Saskatoon), Respondent

LRB File Nos. 129-23 and 130-23; October 2, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Kris Spence

Counsel for the Applicant, United Food and Commercial Workers Union, Local 1400: Heath Smith

Counsel for the Respondent, 610539 Saskatchewan Limited (operating as Heritage Inn in Saskatoon): Steve Seiferling

Application for Interim Relief – Clause 6-103(2)(d) of *The Saskatchewan Employment Act* – Request to Meet with Members – Union Security Clause – Alleged Breach – Remedies Seek Enforcement of Collective Agreement – Jurisdiction – Essential Character of Dispute – Not Appropriate for Board to Step In – Application Dismissed.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an application for interim relief pursuant to clause 6-103(2)(d) of *The Saskatchewan Employment Act* [Act].

[2] On September 12, 2023, the Union applied for an interim order to compel the Employer to permit the Union to arrange meetings with its members and to provide membership information as required under the most recent collective bargaining agreement [CBA] between the parties. The hearing was held on September 18, 2023. On September 20, 2023, the Board issued an Order dismissing the Union's application with Reasons to follow. These are those Reasons.

[3] The background to this dispute is as follows. The parties have a relatively mature collective bargaining relationship, pursuant to a certification order issued by the Board on October 3, 2002.[1]

[4] On June 30, 2019, the most recent CBA expired. Negotiations between the parties took place after its expiry. On June 2, 2023, the Union filed an unfair labour practice application alleging

[1] LRB File No. 161-02.

that the Employer had breached sections 6-7, 6-62(1)(a), 6-62(1)(b), 6-62(1)(k), and 6-62(1)(n) of the Act.[2] A hearing of that application is scheduled to be held from November 20 to 23, 2023.

[5] On September 5, 2023, the Employer served notice on the Union that it intended to lock out its employees, effective September 7, 2023 at 8:30 a.m.

[6] Also on September 5, 2023, the Union informed the Employer that its representatives intended to hold meetings with its members at the workplace prior to the lockout. In response, the Employer, through counsel, sent an email to the Union representatives in which it stated:

> *The Heritage Inn is private property, and you do not have consent to be on the private property.*
>
> *…*
>
> *The Union is more than able to organize and hold meetings away from the Heritage Inn, but the Heritage Inn does not consent to the Union representatives attending on the property.*
>
> *…*

[7] On September 7, 2023, the lockout began. Prior to or around that time, the Employer entered into "extra-CBA" contracts with several of the employees. These employees have continued to work for the Employer since the lockout.

[8] Also on September 7, 2023, the Union began picketing activity. That same day, the Employer, through counsel, emailed certain Union officials reiterating that the Heritage Inn is private property and indicating, "[u]nless you are an invitee (guest, customer) or working employee, you are not to be on the property". The Employer has since filed an application with the Court of King's Bench, ostensibly with respect to the legality of the picketing activities. Neither of the parties has provided the Board with a more detailed description of that application or with copies of the pleadings that were filed.

[9] On September 12, 2023, the Union filed the application upon which the current interim application is based. In the underlying application, the Union alleges that the Employer breached sections 6-4, 6-41, 6-62(1)(a), 6-62(1)(b), and 6-62(1)(e) of the Act.

[10] The Union states that the bargaining unit largely comprises members who speak English as an additional language, who are relative newcomers to Canada, and who are highly

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[2] LRB File No. 076-23.

dependent on the regular income that their employment provides. According to the Union, the effect of the Employer's actions has been to deny access to the Union for a segment of the employees, to create a captive audience, to mislead the members about the law, and to leave the Union unable to provide information to its members. This has undermined support for the Union during the lockout with the consequence of prolonging the dispute. The Employer has been shielded from the economic consequences of its actions.

[11] The Union seeks an Order as follows:

> a. *Providing that the Union will be permitted to arrange individual and group meetings, in the workplace, in accordance with Article 6.04 of the CBA, over the course of one week, notwithstanding the current lockout;*
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> b. *Providing that the Employer will immediately provide to the Union all information for its members required under the terms of the collective bargaining agreement between the Parties, notwithstanding the current lockout;*
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> c. *Providing that the Employer will post the Board's decision within the workplace, in a prominent location, for a period of thirty (30) days; and*
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> d. *Providing such further and other remedies as counsel may advise and the Honourable Board may allow.*

Summary of Arguments:

[12] The Union makes the following points in its argument:

- The Employer has breached provisions of the CBA.
- The Employer has denied access by the Union to its members.
- There is an arguable case that the Employer breached sections 6-4, 6-41, 6-62(1)(a), 6-62(1)(b), and 6-62(1)(e) of the Act.
- The balance of convenience favours the Union. The remedy of mere access to the employees is a simple administrative inconvenience to the Employer. The Employer stands to suffer nothing but to abide by the provisions of the CBA that were in force just prior to the lockout. On the other hand, if the remedy is denied the Union will continue to be unable to communicate with some employees. In the absence of information, the Employer may effectively be holding the employees against their will, denying them their freedom of expression and their rights to participate in their Union.

- The Union acknowledges that, with the lockout in place, the most recent CBA is not in force.

[13] The Employer makes the following points in its argument:

- The onus on this application rests with the Union.
- The Board does not have jurisdiction to grant the relief requested because the relief relates to a dispute pursuant to a CBA. The Union has not filed a grievance. This matter should have been brought before an arbitrator.
- Even if the Board had jurisdiction, the CBA is not in force during a lockout and therefore the remedies sought are not available.
- Given that the Board does not have jurisdiction and that the agreement is not in force, there is no arguable case.
- Even if the Union could overcome these obstacles, the balance of convenience favours the Employer.
- Disputes under the CBA are to be brought through the grievance process that has been established for that purpose. To do otherwise would be a significant departure from the norm.
- It would do harm to the Employer to grant to the Union access to its private property during a labour dispute for the purposes of disrupting a labour dispute.
- With respect to the employee information, the Employer has complied with the CBA. The relief sought is meaningless.
- If relief is denied, the Union would suffer no harm. It would not have access to private property but it would still be able to communicate with its members.

Preliminary Issue – Affidavits

[14] The Union raised an issue with respect to paragraph 22 of the affidavit of Susan Takeda, filed on behalf of the Employer. The Union takes issue with the contents of this paragraph, and attached exhibit, not being within the personal knowledge of the affiant. The paragraph and

exhibits relate to complaints allegedly received by the Employer. The Employer indicated that it sought to file this evidence, including the content of the paragraph and the exhibits, not for the truth of their contents but for the fact that the complaints were received.

[15] The Board permitted these aspects of the affidavit to be admitted only for the purpose as stated by the Employer and not for the truth of the contents of those complaints. It is within the affiant's knowledge that the complaints were received.

Analysis:

[16] In *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB), the Board described its test on an application for interim relief:

> *[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. . . . As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*
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> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". . . .. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. . . . . Simply put, an applicant seeking interim relief need not demonstrate a [probable] violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
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> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. . . . In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. . . . The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. . . . In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. . . .*

[citations removed]

[17] The Union has the onus to establish that the test for interim relief has been satisfied.

[18] To meet its onus, the Union must persuade the Board that the main application raises an arguable case of a potential violation of the Act over which the Board has jurisdiction. In assessing the potential for an arguable case, the Board considers whether the main application discloses facts which, if established at the full hearing, would prove such a breach.

[19] In determining whether the threshold is met, the Board does not place too fine a distinction on the relative strengths or weaknesses of the applicant's case. The Board accepts the affidavit evidence on its face, and refrains from making credibility assessments or from drawing final conclusions on the facts.

[20] In most cases, the arguable case threshold is easily satisfied. But if the Board does not have jurisdiction to hear and consider the dispute, it is not. Relatedly, if the Board does not have jurisdiction to grant the relief requested, then the interim application must be dismissed.

[21] For the following reasons, the Board has decided to dismiss the interim application.

[22] Subsection 6-45(1) of the Act states:

> ***6-45****(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*
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> *[…]*

[23] In *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 (CanLII) [*Horrocks*], the Court found that a similar provision gave an arbitrator empowered under that clause the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary. The Court found that there was no such legislative intent in the case before it.

[24] The Union points out that Part VI of the Act includes provisions, such as sections 6-41 and clause 6-62(1)(r), which together make it an unfair labour practice to fail to abide by the terms of a collective bargaining agreement. In addition, clause 6-104(2)(b) gives the Board the power to

make orders determining whether an unfair labour practice or a contravention of Part VI is being or has been engaged in and clause 6-104(2)(c) gives the Board the power to make an order rectifying a contravention of Part VI.

[25] Taking into account sections 6-41 and clause 6-62(1)(r), the Union suggests that the Board has jurisdiction to decide whether a collective agreement was breached for the purpose of determining whether an unfair labour practice has been committed. Therefore, the Union argues that the Board can consider the matter before it.

[26] To be sure, the Board has a role with respect to collective agreements which arises from its jurisdiction to supervise collective bargaining relationships. For the Board to fulfill its statutory role to supervise the collective bargaining relationship, it may need to determine whether a party is bound by a collective agreement, determine whether a collective agreement is applicable, and in some circumstances where appropriate, interpret a collective agreement that is in force. In some cases, the facts may give rise to both a breach of a collective agreement and an unfair labour practice.

[27] However, this does not mean that the Board should attempt to replace or displace the arbitration procedure provided under the collective agreement. Relatedly, the Honourable George W. Adams explains that "the normal method of enforcement [of union security clauses] would be the use of the grievance and arbitration procedure provided by the collective agreement".[3] He states that labour boards retain "jurisdiction to regulate the implementation and use of union security clauses in terms of unfair labour practices and compliance with statutorily prescribed clauses".

[28] Adams provides examples of cases in which boards have stepped in, including where: an employer refused to insert the statutorily prescribed union security clause; an employer failed to bargain for the removal of the clause; an employer (in a situation involving no first collective agreement) failed to advise each prospective new hire that membership was a condition of employment; and in certain circumstances where an employer refused to offer more than the statutory minimum prescribed clause. Each of these examples revolves around supervising the collective bargaining relationship.

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[3] The Honourable George W. Adams, *Canadian Labour Law*, loose-leaf (3/2023 - Rel 1) 2nd ed (Toronto: Thomson Reuters, 2023), at 12-43.

[29] In past cases, it has generally been the approach of this Board to either defer to arbitration or dismiss the existing application if the essential character of the dispute (or a part of the dispute) is found to fall under the subject matter contemplated in section 6-45.[4] In deferring, the Board has retained jurisdiction over certain aspects of the dispute, including to make any necessary remedies with respect to the alleged unfair labour practices following the conclusion of the arbitration.

[30] In assessing the essential character of the dispute, the Board is to account for "the factual circumstances underpinning the dispute".[5] In other words, the Board is to inquire into the facts alleged, rather than the legal characterization of the matter.[6] The Board is also to consider the "ambit of the collective agreement". In the present case, the factual circumstances revolve around the requests made under the CBA and the resulting communications. The ambit of the CBA very clearly covers the central issues and relates directly to the remedies that have been raised.

[31] In the interim application and the supporting documents, the Union's primary claims are that the Employer has breached two provisions of the CBA. These provisions govern the right of the Union to conduct meetings with its members during regular work hours and the obligation of the Employer to provide the completed membership cards for new employees to the Union. The primary remedies sought, and the only remedies that are truly substantive, seek that the Board enforce the provisions of the CBA that the Union alleges have been breached. The dispute revolves around the alleged breaches of the CBA and the proposed interim solution invokes the enforcement of those same provisions of the CBA. The dispute that is at the heart of the present application, in its essential character, arises from the CBA.

[32] Moreover, Article 7.01 provides for a grievance procedure through which complaints, disagreements, or differences of opinion concerning "any alleged violation" of the agreement are to be addressed.

[33] Not one of the examples presented by Adams is comparable to the present case. In none of them is the emphasis so clearly on the alleged breach of the CBA and the requested enforcement of the CBA.

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[4] See, for example, *International Brotherhood Of Electrical Workers, Local 2038 v PCL Intracon Power Inc*., 2017 CanLII 68787 (SK LRB).
[5] *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 (CanLII) [*Horrocks*], at para 40.
[6] *Ibid*.

[34] The Union also makes allegations about leafletting, but these allegations are peripheral to the main dispute currently before the Board. In both the underlying application and the interim application, the Union alleges that it was engaging in "leafletting" (not of the public but of employees) because the alleged breaches of the CBA resulted in the Union having restricted access to its members. The Union also alleges that the Employer provided trespass notice to Union officials in relation to these activities. The Union's concern is that the Employer has the advantage in communicating with the employees and, while having the advantage, is misleading the employees as to the law of trespass. To rectify the situation, the Union wants more access to its members so it can provide its interpretation of the law to them.

[35] The Union does not, through the interim application, seek any remedy with respect to its leafletting activities. It is also apparent that the Employer has sought a remedy for the Union's picketing and/or leafletting activities through the Court of King's Bench.

[36] To the extent that the trespass allegations raise additional issues, outside of the CBA, this does not justify granting the interim remedies requested. The Union through the underlying application suggests that the Employer, in making the trespass allegations, has continued a course of conduct designed to restrict access to the employees. This conduct contributes to or builds on the allegation that the Employer has committed unfair labour practices, for example, by interfering in the administration of the Union. However, the initial alleged breaches of the CBA are what allegedly caused the restricted access; the trespass activities occurred subsequent to, and potentially as a result of, the initial alleged breaches. They are not the focus of the interim application or the requested remedial relief. Bootstrapping the trespass allegations to the primary concerns does not validate the Board's intervention on an interim basis.

[37] Next, the Union claims that the Board should grant the remedy because, under the circumstances, an arbitrator would not have jurisdiction over this dispute or would not have jurisdiction to grant an interim order. Even if these assertions were found to be correct, they would not on their own justify the Board's intervention.

[38] The Board will explain.

[39] The Union argues that it cannot now file a grievance under a CBA that is no longer in force. It states that the alleged breaches were committed when the CBA was in force but now that the CBA is not in force the grievance procedure is spent, inaccessible, or unenforceable. In stating that the CBA is not in force, the Union relies on *Westfair Foods Ltd. v United Food and*

Commercial Workers, Local 1400, 2004 SKCA 119, 244 DLR (4th) 726.[7] In response, the Employer relies on the same case for its own argument – that the Board has no ability to enforce a CBA that is not currently in force.

[40] The Union acknowledges that the alleged breaches occurred prior to the commencement of the lockout. Furthermore, the Union had notice of the lockout, meaning that it had notice that the time for filing a grievance was expiring. However, it states that it did not file a grievance during this time because of the 30-day time limit for the resolution of the initial grievance Steps.

[41] As an aside, the Union's argument begs the question how any union could seek a remedy through a CBA in relation to an employer who, for example, becomes decertified during the grievance procedure. Related case law was canvassed in *Workers United Canada Council v 7169320 Manitoba Ltd*., 2019 CanLII 24423 (SK LA) [*Workers United*]. There, the arbitrator decided that the relevant rights were vested when arbitration was requested pursuant to section 6-48 of the Act. Multiple cases, canvassed in *Workers United*, have found that rights are vested when a grievance is filed and a decertification does not displace those vested rights. In short, this case law does not support the Union's argument.

[42] Next, it is possible (but not for the Board to decide) that an arbitrator does not have jurisdiction to grant interim relief in this case. A related issue was considered in *United Food and Commercial Workers, Local 649 v Federated Co-operatives Association Limited*, 2018 CanLII 93865 (SK LA) [*Federated Co-operatives*]. There, the Arbitrator summarized the relevant principles:

> *a. Tribunals, including labour arbitrators, only have the jurisdiction granted to them by legislation and the collective agreement. Labour arbitrators do not have any inherent jurisdiction.*
>
> *b. The labour arbitrator's jurisdiction in any particular set of circumstances depends on:*
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> > *i. the interpretation of the language of the legislation using the modern method of interpretation which says the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of the legislator; and*
> >
> > *ii. the interpretation of the language of the collective agreement using the modern method adapted to the interpretation of contracts.*
>
> *c. Therefore, if a labour arbitrator has jurisdiction to grant interlocutory injunctive relief, that jurisdiction must be found in the specific relevant legislation and collective agreement.*

[7] Leave to appeal to SCC refused, 275 Sask R 138 (note).

> *d. If the legislation and collective agreement do not give the arbitrator power to grant interlocutory injunctive relief, the superior court still retains inherent jurisdiction to grant injunctive relief to restrain breaches of collective agreements.*

[43] The parties have pointed to nothing in the relevant legislation or the CBA that grounds an arbitrator's jurisdiction to grant interim relief.

[44] However, the Board does not have inherent jurisdiction. Although it may retain jurisdiction where appropriate, it does not acquire jurisdiction just because an arbitrator lacks jurisdiction to hear the dispute or to issue an interim order. To the contrary, the Board's jurisdiction must be found in the governing statute. It is the superior court that "retains inherent jurisdiction to grant injunctive relief to restrain breaches of collective agreements".

[45] In summary, the Board has found that it does not have jurisdiction to grant the interim relief requested. As a result, the Board has dismissed the interim application in this matter.

[46] Finally, the Board's conclusions are not necessarily determinative of the existence or scope of jurisdiction that it might have over the underlying matter. The current matter is an interim application with a focus on the enforcement of the CBA. The Employer has also indicated that it is prepared to argue jurisdiction on the substantive matter. Therefore, the Board will hear the jurisdictional arguments with respect to the underlying matter in due course.

[47] The underlying unfair labour practice application will be placed on Appearance Day for scheduling.

[48] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, **2nd** day of **October, 2023**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson